95-1094

NO. _____

Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

DARLENE BANFIELD, Executrix of the Estate of
of Harlow F. Banfield; et al.,
Petitioners,

v.

KENNETH W. TURNER, et al.,
Respondent.

Petition For A Writ Of Certiorari From The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

INTRODUCTORY STATEMENT

The fiduciaries (the Respondents) of a qualified defined benefit plan permitted an assignment of income to fund the plan. It is admitted the assigned income is not income of the plan sponsor/employer. The assigned income is that of a separate and distinct entity that has its own employees not covered by the plan.

1. Should the Respondent have been granted a motion for summary judgment when the Petitioner presented a genuine issue of material fact as to whether transfers of funds to a qualified plan

were conducted pursuant to an assignment of income as contented by Petitioner or as a leased employee as contended by Respondent?

2. Should the Respondent have been granted a motion for summary judgment under the standard that Respondent, as movant for the summary judgment, was entitled to judgment as a matter of law, where as a matter of law assignments of income from a sole proprietorship to an unrelated corporate pension plan are not permitted?

3. Should a plan administrator and accountants who (1) has been given full discretionary authority, (2) upon whom complete reliance is placed, and (3) have acted as fiduciaries be held liable

for breach of duty, to the participant/ assignor-of-income in establishment of a qualified pension plan that permits the plans acceptance as a contribution, income that is assigned and is not the profits of the plan sponsor and discriminates against the employees of the assignor of the income; that is not earmarked for the sole benefit of the assignor of the income; that is co-mingled and used to pay the benefits of all plan participants?

5. Should a deficiency in plan assets be allocated to the two highest paid owner/participants or should a deficiency in plan assets be allocated ratably over all plan participants?

6. Should the repayment of a plan loan

include, in addition to the repayment of the loan principal and interest, an additional amount which would include the plans lost opportunity to reinvest the previously unpaid interest?

7. Should fiduciaries decision be deemed arbitrary or capricious that discriminates against a plan participant/assignor-of-income to require him to contribute to his own pension benefits when all other beneficiaries have their benefits contributed by the plan sponsor?

8. Should a trial court require the nonmoving party to a summary judgement to respond when the movant has failed to respond to discovery on questions of disposition of bank account balances?

9. Should, in the determination of summary judgement that an absence of evidence exists, the nonmovant not only be credited with presentation of evidence on the issue of assigned income as admitted in Respondent's deposition but have evidence weighed most favorably in its favor and deemed admitted when the remaining multiple respondents failed to present any evidence in opposition? And is it an abuse of discretion in failing to grant the nonmovant with presentation of such evidence?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. Appellants. In addition to the petitioner Darlene Banfield, Executrix of the Estate of Harlow F. Banfield, the following persons were joint appellants in the appeal to the United States Court of Appeals for the Sixth Circuit:

a. Darlene Banfield

2. Appellees. In addition to the respondent Kenneth W. Turner, the following persons were joint appellees in the appeal to the United States Court of Appeals for the Sixth Circuit:

a. William L. Miller

b. Francis P. Gallagher

c. Thompson Plan Administration Company

d. Peter Visnic

e. Crable, Visnic & Miller

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE BANFIELD, EXECUTRIX

OF THE ESTATE OF HARLOW F. BANFIELD,

ET AL.,

Petitioners,

v.

KENNETH W. TURNER, ET AL.,

Respondents.

The petitioner, Darlene Banfield, Executrix of the Estate of Harlow F. Banfield, et al., by counsel, respectively prays that a writ of certiorari issue to review the judgement and opinion of the United States Court

of Appeals for the Sixth Circuit (the "Court of Appeals"), entered in the above-entitled case on Sept. 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgement the petitioner seeks to have reviewed, is unpublished and is reprinted in the separate appendix to this petition, (Appx. A). The relevant rulings by the United States District Court for the Northern District of Ohio (the "District Court"), namely, the ruling granting the respondents motion for summary judgement, are likewise unpublished and are reprinted in the appendix,(Appx. B).

STATEMENT OF JURISDICTION

The District Court obtained subject

matter jurisdiction by virtue of 28 U.S.C. 1132 and 1331 in that this matter relates to plan benefits payable under an employee welfare benefit plan enacted pursuant to ERISA, 29 U.S.C. 1001, et seq.

The Court of Appeals obtained appellate jurisdiction over the final judgement of the District Court in this matter pursuant to 28 U.S.C. 1291 inasmuch as this is an appeal from a summary judgement by the District Court dismissing with prejudice all claims of petitioners, and a final order pursuant to Rule 54(b), Federal Rules of Civil Procedure.

This Court has discretionary appellate jurisdiction over the final

judgement of the Court of Appeals in this matter pursuant to 28 U.S.C. Section 1254(1). The judgement of the Court of Appeals was rendered in an unpublished opinion of Sept. 12, 1995. The petitioner and other joint appellants filed a petition for rehearing on Sept. 28, 1995, which the Court of Appeals denied on October 12, 1995. (Appx. C)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The following statutes, rules and guidelines govern the review of this case on writ of certiorari:

1. Employees Retirement Income

Security Act of 1974 (ERISA) 29 U.S.C. Sections 1002(6),1103(c)(1), 1103(c)(2)(A)(ii) and 1132(a)(1)(B). Regulations thereto 29 C.F.R. Section 2510.3-3(c)(1). ERISA found at 1982-2 C.B. 462.

2. Internal Revenue Code Sections 401(a), 413, and 414(N).

3. Treasury Decisions (T.D. 8179, 1988-1 C.B. 122 at Example (4).

4. Bureau of National Affairs (B.N.A.) Tax Management Portfolio No. 371 p. A-6.

STATEMENT OF CASE

The District Court in granting summary judgment held Petitioner contributed "private practice income" to pension contributions, implicit in the

holding is that the District Court must have found that the contribution of the private practice income to the pension as proper under the Internal Revenue Code and ERISA.

It is uncontroverted that Dr. Banfield had two sources of income from 1977 to 1988. The first source of income was from an anesthesiology practice - Anesthesiology Association of East Liverpool Ohio ("AAELO") and the second source of income was from a pediatrics practice ("Private Practice"). Each practice was separate and distinct, having its own office, separate employees, were physically segregated, had separate check books and accounting records. From the

commencement of the pediatrics practice until 1977, Dr. Banfield separately reported his pediatrics practice's income on Schedule C of Form 1040. On or about 1977, and in conjunction with the establishment of the AAELO defined benefit plan and the recommendation of the plan administrator Thompson Plan Administration/Gallagher with the ascent William Miller, Peter Visnic, and Crable, Visnic and Miller, Dr. Banfield's Form 1040 preparers who were also the accountants for AAELO, the private practice income was not reported on Dr. Banfield's Form 1040 Schedule C but transferred to the AAELO. The nature of the transfer whether by assignment or via corporate leased employee of Dr.

Banfield to his private pediatrics practice, is a genuine issue of material fact which both lower courts failed to recognize as existing, and which precludes the granting of summary judgment.

The complaint lists, among other causes of action, the improper funding of defined benefit plans.

REASONS FOR GRANTING THE WRIT

For the following reasons this petition should be granted.

I.

LEASED EMPLOYEE v ASSIGNMENT OF INCOME

The judgement of the Court of Appeals should be reviewed by this Court because if failed to recognize a genuine

issue of material fact that a plan participant was not a leased employee but an assignor of income which would preclude the grant of summary judgement.

I.R.C. Section 413 Definitions and Special Rules Section 414(n) Employee Leasing: ". . . (2) Leased Employee - the term "leased employee" requires that such services are (A) provided pursuant to an agreement (emphasis ours) between the recipient and the "leasing organization," and (B) such person has performed such services for the recipient on a substantially full-time basis for a period of at least 1 year, and (C) such services are a type historically performed, in the business field of the recipient, by employees."

Petitioners established per Gabbert Deposition (Appx E.,) separate office and employees (p 5,6,8 13-15,36); transfer of funds from private practice to AAELO p 8,9 18); Dr. Turner never

deposited like checks (p12); that Dr. Banfield had constant control of his private practice(p48); was part-time at the private practice (p24) and that his duties were not historically performed by employees, since he was its sole licensed practitioner (p4,6,24); Therefore, Dr. Banfield could not be a leased employee not having met the requirements of the I.R.C. 414. Nor did Respondents present any evidence to support a leased employee arrangement. Respondent Gallagher deposition on the issue of leased employee states at (Appx. E, Gallagher Dep.P31 L4, L15; P32 L5) Line 4 Q: "Was there a management agreement drawn up?" A:"I have no idea if one was done." Line 15 Q: "Do you

have any other evidence that would support your assertion that Dr. Banfield was a leased employee or under a management agreement?" A: "That was just a proposal. I don't know what was done." P32 L5 Q: Is the phrase leased employee or management contract used in Plaintiffs' EXHIBIT 1 [Thompson Plan Proposal]? (Appx. E) A: "I don't see it mentioned anywhere, no."

Likewise Mr. Miller (Appx E. P26 L2-6) supports the above Q: To your knowledge was there any written documentation that would memorialize the assignment of income between Dr. Banfield's private practice to AAELO? A: "I did not see a written document."

The presentation of the above

creates the genuine issue of material fact that an assignment of income occurred. The materiality and relevance of these facts are that assigned sole proprietorship income can not be contributed to a separate corporate plan as explained below.

II.

ASSIGNMENT OF INCOME DOCTRINE

The judgement of the Court of Appeals affirming granting of the summary judgement should be reviewed by this Court because it conflicts with the decisions of this Court and other Circuits over an important question in federal income taxation and funding of qualified pension plans under ERISA.

Pre-dating both the establishment

of the pension plan in question and the promulgation of the rules for leased employees, is the so-called Assignment of Income Doctrine first described by Justice Holmes in Lucas v Earl 281 U.S. 111 (1930).

A general description of the doctrine is an attempt to shift income from one person or entity to another person or entity to evade tax or have the income paid by another person in a lower tax bracket.

Supreme Court stated that "... The Revenue Act ..., imposes a tax upon the net income of every individual including income derived from salaries, ... for personal services ... of whatever kind and in whatever form paid. ..." The

Court's rational is that "... there is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements (emphasis ours) and contracts however skillfully devised to prevent the salary when paid from vesting even for a second (emphasis ours) in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

The Sixth Circuit stated that income can not be assigned if the

ownership of the underlying income producing asset is retained as stated in Martuccio v.Comm., (1994 CA 6) 1994 US App Lexis 19204.

Petitioner states that the Court of Appeals decision herein is in conflict with both the above cited cases as Dr. Banfield earned this income and did not relinquish control over his private practice.

In support thereof petitioner notes the following facts were established in the record in Mr. Miller's Deposition:

(a) (Appx E) Miller Dep. Page 13, A: My understanding was that Dr. Banfield would assign his private practice income to the corporation." In fact, at nine different times, the

deposition referred to the arrangement as an assignment. Page 17 L1,4,9 ; Page 26 L3,4,6,9; Page 27 L10. He further stated at Page 17 "... prior to the assignment of the income to the corporation, the private practice income would have been reported on his 1040? A:"yes" Q: After the assignment of income, did you report that income on his 1040? A: " Not on his 1040, no."

(b) Mr. Gallagher's Deposition Page 39 and 40 (Appx E) states the motivation was to shelter the income from tax.

III

ASSIGNMENT TO A PLAN NOT ALLOWED

The judgement of the Court of Appeals affirming the summary judgement should be reviewed by this Court because

as a matter of law diversion to a pension plan is an assignment of income.

This Court in United States v. Basle, 410 U.S. 441 (1973) reversing both lower courts stated that their decision was "incompatible with basic principles of income taxation (of assignment of income) as developed in our prior cases, we reverse."

Basle, involved Permanente, a partnership of physicians which provided medical services to Kaiser. Kaiser agreed to pay the partnership Permanente directly plus pay into a retirement plan to benefit Permanente's partners.

The Supreme Court in an opinion delivered by Mr. Justice Powell stated:

"We hold that the courts below erred and that respondents were properly taxable on the partnership's retirement fund income. This conclusion rests on two familiar principles of income taxation, first, that income is taxed to the party who earns it, and, that liability may not be avoided through an anticipatory assignment of that income, (emphasis ours)... ".

" [The] fundamental rule, which this Court has described as, " the first principle of income taxation: that income must be taxed to him who earn it." Commissioner of Internal Revenue v. Culbertson, 337 U.S. 733, 739-740, (1949), " The entity earning the income - whether a partnership or an individual taxpayer [emphasis ours] cannot avoid taxation by entering into a contracted arrangement whereby that income is diverted to some other person or entity. Such arrangements, known in the tax law as "anticipatory assignments of income," have frequently been held ineffective as a means of avoiding tax liability. The seminal precedent, written 40 years ago is Mr. Justice Holmes' opinion for a unanimous Court in Lucas v. Earl (citation omitted) ". . . The principals of Lucas v. Earl, that he who earns income may not avoid taxation through anticipatory arrangements no matter how clever or subtle, has been

repeatedly invoked by this Court and stands today as a cornerstone of our graduated tax system... "

"... Permanente's agreement with Kaiser, whereby a portion of the partnership compensation was deflected to the retirement fund, is certainly within the ambit of Lucas v. Earl. The partnership earned the income and, . . . was responsible for its diversion into the trust fund..." (emphasis ours).

"...that the principle of Lucas v. Earl may not be so easily circumvented. Kaiser's motives for making payments are irrelevant (emphasis ours)..."

There are no exceptions to the Assignment of Income Doctrine and assignment occurs even if it is to a pension plan. This Court has held in Basle that an assignment of income to a pension plan still retains its character as an assignment. The Court of Appeals erred in failing to recognize the

assignment (Appx A.), " the private practice income flowed through the pension plans. "

D.

PLANS CAN NOT ACCEPT ASSIGNED INCOME

The judgement of the Court of Appeals affirming the motion for summary judgement should be reviewed by the Court because as a matter of law pension plans may only accept "employer" contributions.

The limitation on contribution to a pension plan is found in I.R.C. Section 401 (a) and (c) Requirements for Qualification states: "... (c) of contributions are made to the trust by such employer, or employees, or both ..." (emphasis ours)."

The limitation of only "employer"

contributions are repeated in the I.R.C.

(1) I.R.C. Reg. 1.401-1(a)(2) "...A qualified pension . . . is a defined written program (emphasis ours) ... established and maintained by an employer." (emphasis ours)

(2) I.R.C. Reg. 1.401-1(a)(3)(ii)

(ii) "It must be apart of pension plan established by an employer (emphasis ours) for the exclusive benefit of his employees..."

Nor may the plan discriminate against participants for contributions or benefits. See I.R.C. Reg. 1.401-1 et seq. (Appx D). And all the surrounding and attendant circumstances and the details of the plan will be considered.

The Petitioner argues that income upon which an assignment is being attempted contains many tax attributes. The first, as noted in Lucas, as being required to be reported in the

assignor's income. Second, since the assignee-employer never had the right itself to receive the payments made into the trust as current income it is not income of the "employer". Finally, as prescribed by I.R.C. Reg. Sect.1.401-10(e) Definition of employer -" a sole proprietor is considered his own employer". Therefore per I.R.C. Sect 401 et seq. only an "employer" may contribute to a qualified plan, and a sole proprietor can not contribute as an "employer" to the plan of another employer that is "AAELO".

Also this plan did not elect to permit employees to make contributions to this plan. See Gallagher Depos. (Appx. E.) where it is admitted that

despite the assertion that the private practice income being for the sole benefit of Dr. Banfield, but the plan was a defined benefit plan, that plan contributions benefit all beneficiaries. (Appx. E Gallagher Page 55,56,65); that no separate accounts were established for a participant (Page 62); Dr. Banfield made no separate voluntary employee savings option contributions (Page 64) and if he had they would be separately segregated(Page 64). Also notes that the concept of separately segregated benefits is not consistent with a defined benefit plan.

E.

THE DECISION BY PLAN ADMINISTRATORS TO

ALLOW ASSIGNED INCOME IN A DEFINED BENEFIT PLAN IS ARBITRARY AND CAPRICIOUS

The plan administrator and accountants conduct as fiduciaries is arbitrary and capricious. The intent of the plan was to have the private practice income attributed to the sole benefit of Dr. Banfield (Appex E. Gallagher page 55). This requiring them to perform their fiduciary duties in the best interest of Dr. Banfield.

The Court of Appeals misconstrued the Moskal Report and refused to give any weight to the Herr Affidavit nor reconsider the Jaras Affidavit (Appx. E) which support petitioner. Note the report does not contain facts to support the leased employee theory nor indicate

compliance with the I.R.C. The report was to see on an actuarial basis if the plan formula to compute benefits were correct and the Court of Appeals affirmed this believe to track the flow of the funds. Like the Moskal report, the Court of Appeals and District Court decision failed to provide any analysis of the applicable tax or pension law.

The fact that the plan administrators and accountants, as fiduciaries, conceptualized a defined benefit plan which accepts assigned income not earmarked, and which could not be in a defined benefit plan, for the assignor clearly meets an arbitrary and capricious standard. It is arbitrary and capricious, and an abuse

of discretion to decide that (a) person to contribute over $274,000 of his own money and get the same benefit in a defined benefit plan, as he would get if he did not contribute any funds; (b) instituting a plan where at its inception the plan fiduciaries know the corporate sponsor will underfund and that underfunding will be paid by only one of the plan participants; or (c) have one employee pay for his own benefit and all other employees obtain a benefit from the corporate sponsor, is discriminatory in effect, arbitrary as between participants inter se and capricious. Is this Court going to condone such acts of plan fiduciaries?

The issue of misappropriation is

misconstrued by the Court of Appeals. It is not one of a smoking gun. The issue is should the fiduciaries have realized the effect that a defined benefit plan would not provide a greater benefit to a beneficiary/assignor of income? And now coming to the realization of the effect at the time of plan distribution, where funds misappropriated from the intended beneficiary, Dr. Banfield? The "62% equals 62%" notion is the classic comparing of apples and oranges: The private practice income is not included in the actuarial contributions. (See Appx. E Moskal Jaras Report.) The Court of Appeals correctly noted that Moskel Report is an Actuarial Report, that is the defined benefits of

I.R.C. 401 are longevity of service, compensation rates, and ages, not compensation. Moskel states that Dr. Banfield got what he was due based upon those factors not because he contributed funds to the defined benefit plan.

F.

Due to page limitations the Petitioner appeals on all issues before the Court of Appeals .

CONCLUSION

It is the fatal flaw in the establishment of this plan to accept assigned income that creates a cause of action. For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Darlene Banfield, Executrix of the Estate of Harlow Banfield; Darlene Banfield

Date: 12/8/95 By: _____
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